Jany 23 argued.
Jany 26, Aff'd Chief J.

SUPREME COURT OF THE UNITED STATES.

No. ~~265~~ 117.

NOAH G. NASH AND EMERY D. CHAPIN, PLAINTIFFS IN ERROR,

vs.

LEONARD TOWNE, Jr., AND GEORGE W. WASHBURN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 203.

NOAH G. NASH AND EMERY D. CHAPIN, PLAINTIFFS IN ERROR,

vs.

LEONARD TOWNE, JR., AND GEORGE W. WASHBURN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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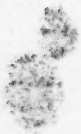

1 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this tenth day of November, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

Fees, $12 75.

1½ UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law, on the second Monday of September, A. D. 1864, at the city of Milwaukee, in said district of Wisconsin, present and presiding the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Hon. Andrew G. Miller, district judge, on the day of the term, to wit, on the day of , A. D. 1864, the following proceedings were had, to wit:

LEONARD TOWNE, JR, AND GEORGE M. WASHBURN
vs.
NOAH G. NASH AND EMERY D. CHAPIN.

Be it remembered, that heretofore, to wit, on the 22d day of July, A. D. 1863, came the above-named plaintiffs, by their attorneys, Messrs. J. La Due and J. Downee, and filed their præcipe for a summons in these words, to wit:

Præcipe.

In circuit court in and for the United States of America, district of Wisconsin.

LEONARD TOWNE, JR., AND GEORGE W. WASHBURN
vs.
NOAH G. NASH AND EMERY D. CHAPIN.

Issue summons in above-entitled cause, returnable Monday, the 27th day of July, instant, in an action of trespass on the case on promises, to the plaintiffs' damage ten thousand dollars.

July 22, 1863.

J. LA DUE,
J. DOWNEE, *Pl'ffs' Att'ys.*

And also filed bond for costs, which was approved. Whereupon a summons issued in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Noah G. Nash and Emery D. Chapin to appear before the circuit court of the United States of America for

the district of Wisconsin, in the ninth circuit, at the United States court-room, in the city of Milwaukee, on the fourth Monday, 27th day, of July instant, then and there to answer unto Leonard Towne, jr., and George M. Washburn in a plea of trespass on the case on promises, to their damage ten thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of Milwaukee, in said district, this twenty-second day of July, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

J. M. MILLER, *Clerk.*

J. La Due & J. Downer, *Attorneys.*

3 And afterwards, to wit, on the 27th day of July, A. D. 1864, came the marshal and made return of the summons herein endorsed thereon as follows, to wit:

Return.

Served on the within-named Emery D. Chapin by showing him this summons and delivering him a copy thereof this 22d day of July, 1863. Served on the within-named Noah G. Nash by leaving a copy of this summons at his usual place of abode with a member of the family, of suitable age and discretion, whom I informed of the contents thereof, this 23d day of July, 1863.

D. C. JACKSON, *Marshal,*
By W. S. JACKSON, *Deputy.*

Service	$4 00
Travel	1 50
Copies	40
	5 90

And afterwards, to wit, on the 3d day of August, A. D. 1863, came the plaintiffs, by their attorneys, and filed their declaration in the words and figures following, to wit:

4 *Declaration.*

District of Wisconsin, *ss:*

Circuit court of the United States for the district of Wisconsin, of the 27th day July, A. D. 1863.

Leonard Towne, jr., and George M. Washburn, plaintiffs in the above action, and who are citizens of the State of Massachusetts, by Joshua La Due and J. Downer, their attorneys, complain of Emery D. Chapin and Noah G. Nash, def'ts, who are citizens of the State of Wis-
5 consin, of a plea of trespass on the case upon promises, for that the said defendants heretofore, to wit, on the fifth day of February, A. D. 1863, at Milwaukee, in the State of Wisconsin, in consideration of $5,500 to them paid by said plaintiffs, sold to said plaintiffs one thousand barrels of flour, of the value of $5,500, and then and there agreed to and with said plaintiffs, for the consideration aforesaid, that they, said defendants, on the request of said plaintiffs, to be thereafter made, and a reasonable time before the 31st day of May, 1863, would ship said flour to said plaintiffs at Boston, in the State of Massachusetts, and deliver to them

at the place of shipment on board the vessel on which the same should be shipped, free of charge, to the said plaintiffs. And the said plaintiffs aver that they did afterwards and at different times, between the first day of April and the 20th day of May, A. D. 1863, request said defendants to ship said flour to them at Boston, in the State of Massachusetts; that they, said defendants, failed and refused to ship the same to them at Boston, State of Massachusetts, and deliver the same on board of any vessel, free of charge, to said plaintiffs, on or before the 31st day of May, 1863, or since, and have never delivered the same to said plaintiffs, but, although often requested to deliver the same to said pl'ffs, have hitherto wholly failed, neglected, and refused to deliver the same, or any part thereof, to said plaintiffs, and

6 do refuse. And the said plaintiffs aver that they, on the fifth day of February, A. D. 1863, were, and ever since have been, and still are, copartners, doing business under the name, style, and firm of Towne & Washburne, and that said defendants were, on the fifth day of February, 1863, copartners under the name, style, and firm of Nash & Chapin, and also were such copartners on the 31st day of March, A. D. 1863, and all the time from said fifth day of February, 1863, until the commencement of this suit, and that they, as such copartners, contracted all the debts for, or for the recovery of, which this suit is brought.

7 For that whereas the said defendants on the tenth day of July, in the year one thousand eight hundred and sixty-three, at the city of Milwaukee, in said district, were indebted to the said plaintiffs in the sum of six thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiffs by the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendant and for the said defendants, and at the special instance and request of the said defendants, and also for divers materials and other necessary things by the said plaintiffs found, provided, used, and applied in and about that work, at the special instance and request of the said defendants; and being so indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants, done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of the said defendants and for the said defendants, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendants then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay the said plaintiffs so much money as the said plaintiffs reasonably deserved to have of the said defendants for the same, when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said plaintiffs therefore reasonably deserve to have of the said defendants for the same the further sum of six thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, indebted to the said plaintiffs in the sum of six thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise and flour by the said plaintiffs before that time sold and delivered to the said defendant, and at the like request of the said defendants; and in the further sum of

ten thousand dollars, of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiffs to the said defendants and at the like request of the said defendants; and for other money by the said plaintiffs before that time paid, laid out and expended for the said defendants and at the request of the said defendants; and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants, although often requested, &c., have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of ten thousand dollars. And therefore the said plaintiffs bring suit, &c.

JOSHUA LA DUE & J. DOWNER,
Plaintiffs' Attorneys.

8 *Plaintiffs' bill of particulars.*

Nash & Chapin to Towne & Washburne, Dr.

1863.		
Feb. 5.	To cash.....	$5, 500
April 22.	To 1, 000 bbls. flour, at $6 00.....	6, 000
May.	To 1, 000 bbls. flour, at $7 00.....	7, 000
June.	To 1, 000 bbls. flour, at $6 00.....	6, 000
May 31.	Money had and received heretofore from sale of flour belonging to us.....	7, 000
July 9.	To money had and received to and for our use from the sale of flour in the year 1863, belonging to us.....	6, 000
July 10.	To cash proceeds of flour sold in the month of April, May, and June, 1863, by you belonging to us, precise date not known.....	7, 000
		44, 500

9 *Rule to plead.*

And afterwards, on the same day, to wit, August 3, 1863, came the plaintiffs, by their attorneys, and entered in the Order and Rule Book their rule upon the defendants to plead in these words, to wit:

Of the first Monday of August, A. D. 1863.

Leonard Towne, Jr., and George M. Washburne
vs.
Emery D. Chapin and Noah G. Nash.

On motion of Joshua La Due and J. Downer, plaintiffs' attorneys, ordered that the defendants plead to the plaintiffs' declaration on file by the first Monday of September next, or their default will be entered.

JOSHUA LA DUE,
J. DOWNER, *Plaintiffs' Attorneys.*

And afterwards, to wit, on the 4th day of August, 1863, came the defendants, by their attorney, E. Mariner, esq., and filed their demurrer, in these words, to wit:

Demurrer.

U. S. circuit court, district of Wisconsin.

EMERY D. CHAPIN AND NOAH G. NASH
vs.
LEONARD TOWNE, JR., AND GEORGE M. WASHBURNE.

10 And the said Emery D. Chapin and Noah G. Nash, by E. Mariner, their attorney, come and defend the wrong and injury, when, &c., and say that the said first count in said declaration and the matters therein set forth in manner and form as therein stated are not sufficient in law for the said plaintiffs to have and maintain their aforesaid action thereof against the said defendants, and that they, the said defendants, are not bound in law to answer the same; and this they are ready to verify. And they specify the following causes of demurrer:

First. That it does not appear in and by said first count where said place of shipment was at which such flour was to be delivered.

Second. It does not appear that the said plaintiffs nor any one for them were at any place of shipment with a vessel upon which to ship said flour, ready to have delivery and to receive said flour, so that the defendants might ship the same, nor that the said defendants had notice of any such vessel being ready to have delivery of such flour, so that the defendants might ship the same.

It does not appear from said count that the said plaintiffs suffered any, nor that damage from the failure of the said defendants to ship or deliver such flour.

Wherefore, for the want of a sufficient count in this behalf, the defendants pray judgment that the said plaintiffs be barred from having
11 their said action against them.

E. MARINER, *Def'ts' Att'y.*

I hereby certify that the above demurrer, in my opinion, is well founded.
E. MARINER, *of Counsel for Def'ts.*

And on the same day, to wit, August fourth, 1863, the defendants filed their plea in these words, to wit:

Plea.

U. S. circuit court, district of Wisconsin.

EMERY D. CHAPIN AND NOAH G. NASH
vs.
LEONARD TOWNE, JR., AND GEORGE M. WASHBURNE.

And now come the said defendants, by E. Mariner, their attorney, and defend the wrong and injury, when, &c., and say that they did not undertake in manner and form as the said plaintiffs hath in their said several counts, except the first count, to wit, in the common counts and money counts in said declaration complained thereof against them. And of this they
12 put themselves upon the country, &c. The said plaintiffs do the like, &c.

E. MARINER, *Def'ts' Att'y.*

And afterwards, on the 5th day of October, 1863, came the parties, by their counsel, and the plaintiffs, by leave of the court, filed an amended declaration in these words, to wit:

Amended declaration.

DISTRICT OF WISCONSIN, ss:

Circuit court of the United States for the district of Wisconsin, of the twenty-first day of July, A. D. 1863.

Leonard Towne, jr., and George M. Washburne, plaintiffs in this action, and who are citizens of the State of Massachusetts, by Joshua La Due and Jason Downer, their attorneys, complain of Emery D. Chapin and Noah G. Nash, defendants, who are citizens of the State of Wisconsin, of a plea of trespass on the case upon promises—

For that said defendant heretofore, to wit, on the fifth day of February, A. D. 1863, at Milwaukee, in the State of Wisconsin, in consideration of five thousand and five hundred ($5,500) dollars to them in hand paid by said plaintiffs, sold to said plaintiffs one thousand barrels of flour, then at
13 Nenah, in said State of Wisconsin, and then of the value of $5,500, and then and there agreed to and with said plaintiffs, for the consideration aforesaid, that they, said defendants, on the request of said plaintiffs, after navigation at Neenah aforesaid should open in the spring of 1863, and a reasonable time before the 31st day of May, 1863, would procure, furnish, or provide a steamer on which to ship said flour, and ship the same to said plaintiffs at Boston, in the State of Massachusetts, and deliver the same on such steamer at Neenah, where said flour then was, free of charge to said plaintiffs, and to be transported in the ordinary manner and with necessary and customary transshipments, to said plaintiffs at said Boston.

And the plaintiffs aver that navigation opened in the spring of 1863, at said Neenah, about the 20th day of April, 1863, and that after that time and in the month of April, they requested said defendants to comply with their said contract and ship said flour to said plaintiffs at said Boston; and also several times during the first twenty days of the month of May, 1863, they, said plaintiffs, requested said defendants to provide and furnish such steamer and ship said flour to them pursuant to the terms of said agreement, and they, said defendants, neglected and refused to provide and furnish a steamer on which to ship said flour, and failed and refused to ship said flour to said plaintiffs at said Boston pursuant to said agreement, and failed to deliver the same free of charge on board any steamer, and afterwards, and
14 before the commencement of this suit, said plaintiffs demanded said flour of said defendants, and they refused to deliver the same to them, said plaintiffs, or any part thereof, either on board of a steamer at Neenah aforesaid or anywhere or at any place, to the damage of said plaintiffs of seven thousand dollars, ($7,000.)

And said plaintiffs aver that said flour, at the time of such refusal to deliver the same, and during the months of April and May, 1863, was of the value of seven thousand dollars, ($7,000.)

And the said plaintiffs aver that they, on the fifth day of February, A. D. 1863, were, and ever since have been, and still are, copartners, doing business under the name, style, and firm of Towne & Washburn, and that said defendants were, on the fifth day of February, 1863, copartners under the name, style, and firm of Nash & Chapin, and also were such copartners on the 31st day of March, A. D. 1863, and all the time from said fifth day of February, 1863, until the commencement of this suit, and that they, as such copartners, contracted all the debts for, or for the recovery of, which this suit is brought.

15 And also for that whereas the said defendants, on the tenth (10th) day of July, in the year one thousand eight hundred and sixty-three, at the city of Milwaukee, in said district, were indebted to the said plaintiffs

in the sum of six thousand ($6,000) dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiffs by the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendants and for the said defendants and at the special instance and request of the said defendants, and also for divers materials and other necessary things by the said plaintiffs, found, provided, used, and applied in and about that work, at the special instance and request of the said defendants, and being so indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants, done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of the said defendants and for the said defendants, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendants then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay the said plaintiffs so much money as the said plaintiffs reasonably deserved to have of the said defendants for the same when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said plaintiffs therefore reasonably deserve to have of the said defendants for the same the further sum of six thousand (6,000) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiffs in the sum of ten thousand (10,000) dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendants and at the like request of the said defendants; and in the further sum of ten thousand (10,000) dollars, of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiffs to the said defendants, and at the like request of the said defendants; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants and at the request of the said defendants; and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants, although often requested, &c., have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of ten thousand (10,000) dollars. And therefore the said plaintiffs bring suit, &c.

JOSHUA LA DUE,
J. DOWNER, *Plaintiffs' Attorneys*

16 *Plaintiffs' bill of particulars.*

Nash & Chapin to Towne & Washburn, Dr.

1863.		
Feb.	To cash paid your draft	$5,500
Apr. 22.	To 1,000 bbls. flour	6,000
May.	To 1,000 bbls. flour	7,000
June.	To 1,000 bbls. flour	6,000
May 31.	To money had and received heretofore for flour belonging to us	7,000
July 9.	To money had and received to and for our use from the sale of flour in the year 1863, belonging to us	6,000
July 10.	To cash proceeds of flour, sold in the months of April, May, and June, 1863, by you, belonging to us, precise dates not known	7,000

Whereupon it is ordered by the court that the demurrer be, and hereby is, overruled, and that the defendants plead to said amended declaration by the first Monday of November next.

And afterwards, on the 5th day of November, 1863, came the defendants, by their attorney, Mr. Mariner, and filed their plea to amended declaration, together with affidavit of merits, in the words and figures following, to wit:

17 *Plea to amended declaration.*

U. S. circuit court, district of Wisconsin.

Emery D. Chapin and Noah G. Nash
ads.
Leonard E. Towne, Jr., and George M. Washburn.

And now come the said defendants, by E. Mariner, their attorney, and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the said plaintiff have above thereof complained against them. And of this they put themselves upon the country. And the said plaintiffs do the like, &c.

E. MARINER, *Def'ts' Att'y.*

District of Wisconsin, ss:

Emery D. Chapin, being duly sworn, says that the defendants have a good and substantial defence to the above-entitled action on the merits, and to the whole thereof, as they are advised by their counsel and verily believe.

EMERY D. CHAPIN.

Subscribed and sworn to before me this 4th day of November, 1863.

THEODORE B. ELLIOTT,
Notary Public, Mil. Co., Wis.

18 And afterwards, on the the 18th day of May, 1864, depositions received from E. Mariner and filed. And afterwards, on the 14th day of September, 1864, depositions received from Francis Bloodgood, esq., and filed.

And afterwards, at a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, began and held according to law, at the city of Milwaukee, on the second Monday, being the twelfth day, of September, A. D. 1864, present and presiding the Honor-

able Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Andrew G. Miller, district judge, on the fourth day of said term, to wit, on the fifteenth day of September, A. D. 1864, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Richard B. Winsor, David Moul, George J. Fowler, Jared Thompson, J. Fowle, Charles J. Kern, C. G. Heath, S. S. Daggett, W. H. Armstrong, James Campbell, George Robinson, and Robert Menzies, twelve free, honest, and lawful men of the district, who were severally sworn and impanneled, and the trial not being concluded the same was adjourned until to-morrow morning.

SEPTEMBER 16, 1864.

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and the trial not being concluded the same was adjourned until to-morrow morning.

SEPTEMBER 17, 1864.

This day came the parties, by their counsel, and the trial of the
19 issue herein was resumed, and the trial not being concluded the same was ajourned until Monday morning.

SEPTEMBER 19, 1864.

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid being charged by the court retired to their room, under charge of a sworn officer, to deliberate on their verdict with leave to bring in a sealed verdict.

SEPTEMBER 20, 1864.

This day came the parties, by their counsel, and the jurors of the jury aforesaid came into court with a sealed verdict, and on their said oaths respectively do say that the defendants did assume and promise in manner and form as the plaintiffs have herein declared against them, and assess the damages to the said plaintiff at the sum of six thousand one hundred and twenty dollars and fifty-nine cents.

And afterwards, on the 22d day of September, 1864, came the defendants, by their counsel, and filed their motion for a new trial in these words, to wit:

Motion for new trial.

LEONARD TOWN, JR., *et al.*
vs.
NOAH G. NASH *et al.*

And now come the said defendants and move this court for a new trial in this cause, for the reason that the court improperly admitted the bill of sale and letters accompanying the same and the draft and proof of pay-
20 ment thereof, and improperly excluded the testimony offered by the defendants to prove that in making the sale the defendants acted in making such sale as agents for S. G. Burdock, and that they then and there disclosed their principal to the plaintiffs, and that the court improperly charged the jury that if Nash & Chapin have received money from the plaintiffs, the consideration for which has failed and which in equity they ought to pay back, that then their verdict should be for the def'ts.

And for that the court further improperly charged the jury that the true construction of the two contracts offered in evidence, the bill of sale and the letter of the def'ts, dated Feb. 5, 1863, was a sale of flour for future delivery.

And for that the court improperly charged the jury that Washburn must have had it in his mind that he would accept those receipts as a delivery of the flour before there then could have been an acceptance of the receipts.

And for that said court further charged the jury that if Nash & Chapin had sold this flour and had received the money for it, then that their verdict should be for plaintiffs.

E. MARINER, *Def'ts' Att'y.*

And afterwards, on the 28th day of September, 1864, came the parties, by their counsel, and it is ordered by the court that the motion of the defendants for a new trial be, and the same is hereby, overruled.

21 *Judgment.*

Whereupon it is considered and adjudged by this court now here that the plaintiffs do have and recover of the said defendants, Noah G. Nash and Emery D. Chapin, the said sum of six thousand one hundred and twenty dollars and fifty-nine cents so assessed by the jury, with one hundred and five dollars and sixty cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment roll signed September 28, 1864.

A. SCOTT SLOAN, *Clerk.*

Damages	$6,120 59
Costs	105 60

And afterwards, to wit, on the 28th day of September, 1864, came the defendants, by their attorney, and filed their bill of exceptions, duly signed, in the words and figures following, to wit:

22 *Bill of exceptions.*

Circuit court of the United States for the district of Wisconsin.

LENARD TOWNE, JR., AND GEORGE M. WASHBURN
vs.
NOAH G. NASH AND EMERY D. CHAPIN.

Afterward, to wit, on the 15th day of September, 1864, before their honors Samuel F. Miller, justice of the Supreme Court, and Andrew G. Miller, judge of the district court, and a jury of said court, duly impannelled, tried, and sworn to try the issue aforesaid, at which time came the parties and their counsel, and the plaintiffs, to prove the issue on their behalf, produced and offered to read in evidence a letter, which was admitted to have been written by the defendant to the plaintiffs and a bill of sale admitted to have been enclosed in the letter and signed by the defendant, in the words and figures following:

MILWAUKEE, *Feb.* 5, 1863.

Messrs. Towne & Washburn:

DEAR SIR: Your Mr. W. left here yesterday for Chicago, and before going off we sold him 1,000 bbls. round hoop flour, Empire Mills, Iowa, free on board steamer, at Neenah, for $5 50, for which find bill enclosed. We have

the flour stored and insured all O. K., and will value on you at sight
23 for the amount. We think we have given you an A 1 trade, as we think we have sold no better flour on same terms, at $6.

Yours, &c.,

NASH & CHAPIN.

MILWAUKEE, *Feb.* 5, 1863.

Messrs. Towne & Washburn bought of Nash & Chapin, general commission merchants, 1,000 bbls. flour, Empire Mills, Iowa, round hoop, 5½..... $5, 500

Rec'd payment, sight draft.

NASH & CHAPIN.

But to the reading of the same in evidence, being all the testimony offered on the first count in the declaration, the said defendants, by their counsel, did then and there object that such letter and bill were not the same contract set out in the special count, and tended to prove a different contract than the one set out in the declaration in the special count, and that the same was by reason of such variance not admissible under the other counts in the declaration. But the court then and there overruled such objection; to which ruling and decision the defendants did then and there except, and the said letter and bill were read in evidence to the jury.

And the said plaintiffs, further to prove their case, offered in evi-
24 dence a draft, which was in the ordinary form, and was admitted to have been drawn by the defendant, bearing date Feb. 5, 1863, at Milwaukee, and directed to the plaintiffs, at Boston, Mass., requiring them to pay to the order of E. D. Chapin, at sight, the sum of $5,500, and offered to accompany the same with proof that such draft was drawn in payment for the flour described in said bill and letter, and paid by the plaintiffs; but to the reading thereof, and to the proof offered therewith the defendant objected that the same was immaterial to the issue, and varied from the premises alleged in the declaration. But the said court then and there overruled such objection; to which ruling and decision the defendants did then and there except, and said draft was then and there read to the jury, and the plaintiff Towne, being sworn as a witness, proved that such draft was drawn in payment for said flour, and also the payment of the draft by the plaintiff.

And further to prove the plaintiffs' case, the plaintiff Towne testified that he had an interview, in July, 1863, with defendant Chapin, touching this one thousand barrels of flour, described in the bill of sale.

And further to prove the plaintiffs' case, they put the following question to the witness: What was said by the defendant Chapin at that interview as to where the flour described in the letter and bill was stored;
25 whether it had been delivered, and if not, as to why it had not been delivered. But to the admission of that question the defendant did then and there object that inasmuch as the plaintiff had failed to prove the special count in their declaration, and had proved an existing contract to deliver flour to the plaintiffs, that it was not competent for the plaintiff to prove any other contract than the one set out, nor to prove a breach of such other contract under the other counts in the declaration. But the said court then and there overruled such objection; to which ruling the defendants then and there excepted. The witness testified Chapin stated at that interview that the flour was in store in the government warehouse at Green Bay. He telegraphed to Dousmann & Elmore, inquiring where this flour was, and they answered that it had been delivered to Young, June 28th. I then de-

manded of Chapin that he deliver me this flour. He did not do it. Neither Nash or Chapin, or any one for them, has ever delivered that flour to us. But said Chapin then and there claimed that the plaintiffs agreed at the sale of this flour to take the warehouse receipts of S. G. Burdick for the flour, and that they requested the defendant to hold such receipts for the plaintiffs, and that the defendant had done so, and refused to deliver the flour or anything but the receipts.

26 And further to prove their case, the plaintiffs proved that in the early part of February, 1863, Samuel G. Burdick, had the control of the old railroad warehouse at Neenah, and had in store there one thousand barrels of flour, Empire Mills, Iowa, round hoop, and that the same was shipped by the railroad company on the fifth day of March, 1863, to Dousmann & Elmore, at Green Bay, for account of said Burdick.

And further to prove their case, the plaintiffs called Talbot C. Dousmann as a witness, who, being duly sworn, testified: I am one of the firm of Dousmann & Elmore; our firm received from Neenah on the fifth day of March, 1863, one thousand barrels of flour, Empire Mills, Iowa, round hoop, and stored the same in the government warehouse for the account of S. G. Burdick.

And further to prove their case, the plaintiff offered to prove by the witness that a part of that one thousand barrels of flour had been shipped to the plaintiffs for the account of the defendant and again paid for by the plaintiffs, and that the remainder of that one thousand barrels had been shipped for the account of William Young, and that upon such shipment the said Young had surrendered warehouse receipts of said Burdick, which had been guarantied by the defendants. And there to put the following question to the witness: What became of that flour? But to the admissibility

27 of that question and of such proof the said defendants did then and there object, that inasmuch as the said plaintiffs had failed to prove their special contract as laid in the first count, but has proved a subsisting contract with the defendants for the purchase of this flour, they are not at liberty in this cause to prove a different contract and a breach of it, or to abandon his special and express contract and recover upon an implied one under either of the counts in the declaration, and for that said testimony was irrelevant and immaterial to the issue. But the said court then and there overruled such objection; to which ruling and decision the said defendants then and there excepted. And the witness further testifies that about two hundred and fifty barrels out of said lot of flour was shipped to Towne & Washburn for the account of Nash & Chapin; that it was taken by Dousmann & Elmore for their convenience in making out a shipment for account of Nash & Chapin by Burdick, and that they afterwards made the lot good with other flour belonging to Burdick, of the same brand, and that afterwards the whole lot was shipped for the account of William Young.

And further to prove the case, the plaintiffs called William Young as a witness, who, being duly sworn, testified: I bought flour of Nash & Chapin, about eight thousand barrels; they sold it to me as agents of S. G.

28 Burdick; they delivered me warehouse receipts executed by Burdick on such sales; I had a verbal agreement with them that they should guaranty all Burdick's receipts. When the thousand barrels which were stored in the government warehouse were shipped, I surrendered two of the warehouse receipts executed by Burdick, which I had received of Nash & Chapin. My receipts were all for flour stored in the Cronkhite warehouse. I got this flour from the government warehouse by Burdick's directions.

And further to prove this case, the plaintiffs read in evidence two warehouse receipts, one bearing date Jan. 31st, 1863, and the other Feb. 5, 1863, in the form following:

NEENAH, *Jan'y* 31*st*, 1863.

Received in store of Nash & Chapin five hundred barrels Empire, Iowa, r. h. flour, to be delivered, on return of this warehouse receipt, free on board steamer.

S. G. BURDICK.

Endorsed: NASH & CHAPIN.

And the plaintiffs further introduced evidence tending to prove that said one thousand barrels of flour and no more were stored in the railroad warehouse at Neenah, by said Burdick, and that the same was afterwards removed by said Burdick, with the knowledge and consent of said Nash & Chapin, to the government warehouse at Green Bay.

29 The defendants, to prove the case on their behalf, called the defendant Chapin as a witness, who, having been duly sworn, testified: The sale of this one thousand barrels of flour was negotiated by Mr. Washburn and myself on behalf of our respective firms, on the fourth day February, 1863, at our counting-room in this city. And further to prove their case, the defendants offered to prove by the witness that the defendants in negotiating the sale of that flour acted as agents for Samuel G. Burdick, and that they informed the plaintiffs during the negotiation of their agency, and that the said Burdick was their principal, and that the proceeds of the sale were immediately paid over to said Burdick, less their commission for making such sale, and thereto put the following question to the witness: What, if anything, was said during the negotiating such sale as to whether the defendants were acting as agents or principal in making such sale? But to the admissibility of that question and of such testimony the said plaintiffs did then and there object that said contract and the evidence thereof were in writing, and that contemporaneous or prior verbal declarations or agreements could not be proved in modification or to contradict them.

30 And the circuit court then and there sustained such objections; to which ruling the said defendants did then and there except.

Afterwards, the parties having rested the case, the said court then and there charged the jury that if they found from the evidence that the plaintiffs had paid money to the defendants for a consideration which had failed, and which in equity the defendant ought to pay back, then their verdict must be for the plaintiffs. To which charge the said defendants did then and there except.

And the said court immediately further charged the jury that if they found said defendants executed and delivered the bill of sale, and letter or contract read in evidence, and the plaintiffs paid them for the flour specified, $5,500, and the defendants afterwards failed and refused to deliver the flour when called for or demanded, then their verdict should be for the plaintiffs for the amount paid by them and interest, unless the defendants delivered to and the plaintiffs accepted the warehouse receipts in evidence, in lieu of the flour. To which the said defendants did then and there except.

That at the time the defendants asked the court to charge the jury as follows: "That the plaintiffs cannot recover in this cause against the defendants damage for the conversion of that flour without proof that the defendants have after such conversion sold the flour and received pay for

31 it, and in that case for only the amount actually sold and paid for, and only the price paid to them;" and said court gave said instruction, and then added that the converse of such instruction was also true, that if they found from the evidence that said defendants had sold said one thousand barrels of flour or any part of it, and had received the money therefor or the benefit of such sale and payment therefor, then the verdict should be for the amount so received by defendants, unless said plaintiffs had ac-

cepted the warehouse receipts of the defendants as a delivery of the flour. To which charge the said defendants did then and there except.

And because none of said several exceptions appear of record in this cause, the said defendants have prayed this court to seal this bill of exceptions, and it is done this 28 day of September, 1864.

SAM. F. MILLER. [SEAL.]
A. G. MILLER. [SEAL.]

32 And afterwards, to wit, on the first day of October, 1864, came the defendants and filed their bond to the plaintiffs, duly approved by the district judge; which said bond and the approval thereof are in the words and figures following, to wit:

Know all men by these presents that we, Noah G. Nash and Emery D. Chapin, as principals, and Alexander H. Johnston and Henry H. West, as sureties, are held and firmly bound unto Leonard Towne, jr., and George M. Washburn in the sum of twelve thousand four hundred dollars, lawful money of the United States of America, to be paid to the said Towne and said Washburn, their executors, administrators, or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals this 28th day of September, 1864.

Whereas the above-bounden Noah G. Nash and Emery D. Chapin have sued out a writ of error to the Supreme Court of the United States to reverse a judgment recovered by the above obligees in the circuit court of the United States, held in and for the district of Wisconsin, against them, the said Nash and said Chapin, on the twenty-eighth day of September, 1864: Now, therefore, the condition of this obligation is such that if the above named Nash & Chapin shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force
33 and virtue.

EMERY D. CHAPIN. [SEAL.]
NOAH G. NASH. [SEAL.]
HENRY H. WEST. [SEAL.]
ALEXANDER H. JOHNSTON. [SEAL.]

Sealed and delivered in presence of—
E. MARINER.

DISTRICT OF WISCONSIN, *ss:*

Henry H. West and Alexander H. Johnston, being sworn, doth say, each for himself, that he is the owner of property in this district, and is worth in his own right ten thousand dollars over and above his debts and liabilities.

H. H. WEST.
ALEX'R H. JOHNSTON.

Sworn and subscribed the 1st day of October, 1864.

A. G. MILLER, *District Judge.*

OCT. 1, 1864.

This bond and sureties approved.

A. G. MILLER, *Dis. Judge.*

Whereupon a writ of error issued; and afterwards on the 3d day of October, 1864, a citation was duly issued, and was afterwards, on the 4th day of October, 1864, returned endorsed thereon as follows:

"Due service of the within citation admitted this 3d day of October, 1864.

"J. LA DUE & J. DOWNER,
"*Att'ys for Def'ts in Error.*"

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said district court of the United States of America for the district of Wisconsin before you, between Leonard Towne, jr., and George M. Washburn, plaintiffs, and Noah G. Nash and Emery D. Chapin, defendants, a manifest error hath happened, to the great damage of the said Noah G. Nash and Emery D. Chapin, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this first day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

Filed 7th December, 1864.

35 UNITED STATES OF AMERICA, *ss:*

To Leonard Towne, jr., and George M. Washburn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next hereafter, pursuant to a writ of error filed in the clerk's office for the circuit court of the United States for the ninth circuit and district of Wisconsin, wherein Emery D. Chapin and Noah G. Nash are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Roger B. Taney, chief justice of the said Supreme Court of the United States, this third day of October, 1864.

A. G. MILLER, *District Judge.*

Due service of the within citation admitted this 3rd October, 1864.

J. LA DUE & J. DOWNER,
Att'ys for Def'ts in Error.

Filed Oct. 4, 1864.

DECEMBER TERM 1866.

SUPREME COURT OF THE UNITED STATES

NOAH G. NASH AND EMERY D. CHAPIN,

Plaintiffs in Error,

vs.

LEONARD TOWNE, Jr., AND GEORGE W. WASHBURN,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

E. MARINER,
Plaintiffs' Attorney.
W. P. LYNDE,
Of Counsel.

H. YEWDALE, Printer, cor. East Water and Michigan Sts., Milwaukee.

SUPREME COURT OF THE UNITED STATES.

NOAH G. NASH AND EMERY D. CHAPIN,

Plaintiffs in Error,

vs.

LEONARD TOWNE, JR., AND GEORGE W. WASHBURN,

Defendants in Error.

The plaintiffs in error were commission merchants in the city of Milwaukee and were agents of S. G. Burdick, a miller at Neenah to sell his flour. On the 4th of February, 1863, the plaintiffs in error as agents of Burdick sold to the defendants in error, who knew that they were acting as agents for Burdick, in making the sale, one thousand barrels of flour to be delivered at a future day, and gave the defendants in error, Burdick's warehouse receipts for the flour, which was then manufactured, and which receipts were endorsed by the plaintiffs in error, (folio 28, p 13) which receipts so endorsed transferred the title of the flour to the defendants in error, (Gen. Laws of Wisconsin, A. D. 1860, p 346). The sale was made by one of the plaintiffs in error to one of the defendants in error, who was in Milwaukee, the next day the plaintiffs in error sent letter of advice to the defendants in error at Boston, Mass., and enclosed a bill of parcels receipted, and drew at sight for the pay for the flour, which draft was paid by the defendants in error, and thereupon the plaintiffs in error paid the money over to Burdick less their commissions on the sale. Flour depreciated in the market and Burdick failed before the time for the delivery had elapsed, and he delivered his flour to one Young. The defendants in error rather than follow the flour, demanded it of the plaintiffs in error, who refused to deliver it and the defendants in error brought this suit, relying upon the fact that in their letter and the bill of parcels the plaintiffs had omitted to state their agency and that under the cases of Jones vs. Littledale, 6 Ad. and Ell. 486, and Higgins vs. Senior, 8 Mees and Welsb. 833, they would not be allowed to prove it.

I.

The letter of the plaintiffs in error and the receipted bill (fol. 22, page 10 of the case) varied from the contract set out in the first count in the declaration as to the time of the delivery of the flour, and as to the agreement to furnish a steamer upon which to ship the flour and the agreement to ship it.

The declaration sets out the time of delivery to have been after the opening of navigation in the spring of 1863, (April 20. 1863.) and before the 31st day of May, 1863. The utmost that can be said of the letter is, that in as much as the delivery must be on board steamer, the delivery should be within a reasonable time after the opening of navigation, which is a very different period.

Again, the declaration avers that the plaintiff in error agreed to provide a steamer and make the shipment and pay the charges of the warehouseman for storage and delivery to the steamer, (f. 13 p. 6), while the letter only agrees to pay the warehouseman's charges for storage and delivery to steamer (fol. 22.) The defendants in error would, in the one case, have the burthen and control of the shipment, the selection and the employment of the vessel, and the plaintiffs in error in the other, matters which are quite material. These variances are to the legal signification of the contract and are fatal.

Sheehy vs, Mandville, 7 Cranch 208.
Covington vs. Comstock, 14 Peters 43.

These papers were also inadmissible under the general counts, as they tended to prove an existing agreement to deliver flour which must be counted upon specially,

Chitty 346-7.
Spratt vs. McKenney, 1 Bibb. 595.
Brooks vs. Scott, 2 Mumf. 344.
Burrall vs. Jacob, 1 Barb. 165.
Cochran vs. Tatum, 3 Monro. 405.

II.

The Circuit Court erred in overruling the objection of the plaintiffs in error to the question, "What was said by the defendant Chapin at that interview as to where the flour described in the letter and bill was stored, as to whether it had been delivered, and if not as to why it had not been delivered.

The Plaintiff had averred a contract to deliver flour at a future time. He had proved that a different one than the one he alleged had been made between the parties touching the same property; proving a breach of that contract would not prove the breach of his first count, nor of any of his counts.

Cooke vs. Munstone, 2 Bos & Pul New Reports 351.
1 Term Reports 136.
Weston vs. Downes, Douglas 23.
Linningdale vs. Langston, 10 John. 36.
Clark vs. Smith, 14 John. 324.
Robertson vs. Lynch, 18 John. 451.
Miller vs. Watson, 4 Ware, 267.

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It may be said that the plaintiffs in error broke their contract in refusing to deliver the flour, and that the defendants in error might elect to rescind the contract, and recover back the money they had paid, under the count, for moneys had and received. It would seem that there were two answers to that assumption. The first, and a conclusive one is, that conceding that right to the defendants in error they have elected not to rescind the contract to deliver, but have affirmed it by bringing an action for the non-delivery of the flour. It would be very mischievous if a plaintiff having a right to elect which course he would pursue, should not do so when he brought his action. The pleadings in a cause ought to be sufficiently definite to enable a defendant to make a tender intelligently. The measure of damages for a breach of the special contract would be the value of the flour at the time of the breach, little or much. And the defendants by tendering that sum interest, and costs might end the suit. In the action for moneys had and received, the recovery would be the debt and interest. The defendant ought to be able, with the advice of able counsel to tell upon what contract the suit was brought.

Second. The defendant in error had no such right to rescind. He has a contract for the payment of money fully performed on his part which is open, and upon which he can recover for a breach by the plaintiffs in error. Both parties when they entered into the contract, contemplated the value of the flour at the time of delivery, as the measure of damages; neither party reserved the right to rescind by the terms of the contract, and the measure of damages is fixed instantly by the breach, and there is no rule of law which will allow a party at his option to aggravate the damages which the law imposes for the breach. If the contract were yet executory in any measure by the defendants in error, and something more were to be done before he could recover for a breach he might perhaps rescind; but it is not, it is wholly performed on their part, and as soon as it was broken by the plaintiffs in error in not delivering the flour, every stipulation in it was broken, and it became mere a right to sue and recover damages, the measure of which is well settled in the law. Certainly the defendants in error could not claim the right to rescind before the breach.

III.

The Court below erred in excluding the question put the witness Chapin, (folio 29, p. 13.) "What if anything was said during the negotiating of such sale, as to whether the defendants were acting as agents or principals in making such sale," and in excluding the testimony offered therewith, and also in instructing the jury "that if they found from the evidence, that the plaintiff had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, then their verdict must be for the plaintiff."

The plaintiffs below had utterly failed to prove the special count. In fact no attempt was made to prove it, except by the letter and receipt, (p. 11, fol. 23.) We have seen that it was not competent to prove an agreement to deliver flour under the common counts. No other right of recovery is

22 Wend 244 Spt 4 Letters

claimed except moneys had and received to recover the consideration paid. There is no contract to pay back that money between the parties. It could only be recovered in a case where the defendant had received money of the plaintiff, which *ex aequo et bono* he should return.

Stratton vs. Rastall, 2 Term. Reports, 316.

The offer was to prove that the plaintiffs in error, while the money passed through their hands, did not receive it, and that this was with the knowledge of the defendants in error, so that the plaintiffs in error did not detain it.

That in all things they acted as agents, and that their agency was known to the defendants in error. In other words, the offer was to prove that the plaintiffs in error did not receive and had not detained the money of the defendants in error. The evidence was excluded upon the ground that the contract was in writing, and that they had charged themselves by the writing upon the authority of Jones vs. Littledale and Higgins vs. Senior, and that class of cases, overlooking the fact, that while in those cases the action was directly upon the contract, in this case it is not, and that the contract in this case is only valuable in evidence as an admission of a fact, which admission could be contradicted or explained, or proved to be mistaken. If there had been no written contract between the parties, and the plaintiffs in error had acted, in making the sale, as the agents of Burdick, and the defendants in error had purchased of them as such agents, certainly no action would have lain against plaintiffs in error for a failure to deliver the flour.

Now when the action is brought, not upon the contract, but upon the facts and the equities growing out of them, why should not all the facts be proved? There either is a contract open between the parties or there is not. If there is an open contract, the action must be upon it. If the contract is abandoned or rescinded, it is rescinded for both parties—it is at an end—is no contract. The plaintiffs in error are no more concluded by it than the defendants. It seems to me that the error of the ruling is made patent by the language of the instruction. How could the jury tell who had received the money except by proof of all the facts, and especially how could they say that the defendants ought, in equity, to pay back this money without knowing whether the plaintiffs intended to pay, and did pay their money to Burdick or the defendants; and whether Burdick or the defendants actually had the benefit of the money?

Again, if we concede that the plaintiffs in error would be concluded by a contract, the writings read in evidence are neither, separately or collectively, a contract. Not the letter certainly, for it says expressly *that the contract was made the day previous to the writing*; not the receipted bill, for that was made the day after the sale, and is a mere receipt, and not a contract.

Filkins vs. Whyland, 24 N. Y. 338.

Allen vs. Pink, 4 Mees & Welsb, 140.

It was supposed, on the trial, that Higgins vs. Senior, and Jones vs. Littledale were decisive, and against us upon this point; but it would seem not, both of the papers there are clearly contracts, both are sold notes, both were delivered and received at the time of the sale as such. This bill, on the

contrary, is like the writings in Wilkins vs. Whyland, and Allen vs. Pink, clearly a receipted bill of parcels, and not such as would exclude parol testimony. It should not be overlooked that Higgins vs. Senior and Allen vs. Pink were decided by the same Court, and within a very short period of each other.

IV.

Again the Circuit Judge erred in instructing the jury (fol. 30, page 13) "that if they found that the defendants executed and delivered the bill of sale and letter or contract read in evidence, and the plaintiff paid them for the flour specified, $5,500, and the defendants afterward failed and refused to deliver the flour when called for, their verdict should be for the plaintiff for the amount paid by them and interest." This instruction directs positively *a recovery upon the contract.* The jury are not allowed to enquire whether the contract was rescinded or not If the defendants contracted, as they say they did in their letter, and have broken their contract, they are entitled to recover. There are two objections to this charge. There is no such contract set out in the declaration, as is evidenced by the letter and bill of parcels and the record would not be a bar to a new action on the letter and bill of parcels.

And, second: The measure of damages is incorrectly stated. The amount of the recovery for a breach of the contract would be the value of the flour at the time when it should have been delivered.

To be short, we complains that the defendants in error have had the opportunity against the objections of the plaintiffs in error to recover under the common counts in their declaration, upon an entirely different contract from the one they set out, which common counts were not adapted to the contract set out; as if the office of the common counts in an action upon a special assumpsit was to avoid the objection of variance, and it is impossible for this Court to say that they have not recovered upon such a contract.

Next—They have had an opportunity after they have affirmed their special contract, by bringing an action upon it, (for it must be remembered that there has been no attempt by the defendants in error to prove the actual contract made on the day preceding the writing of the letter,) and that while they still have that contract, and after the rights of the parties have been fixed by a breach of the whole contract upon the trial to elect to rescind the contract, and recover under the count for moneys had and received—so much of their money as the plaintiffs in error have received, and which in equity they ought to return; and it is impossible from the record for this Court to say that they have not so recovered.

And lastly having abandoned the contract, and sought to recover as for moneys had and received for their use, so much of their money as the plaintiffs have received, and ought not in equity to retain, and the plaintiffs in error have been prohibited from proving that they did not receive, and do not retain any money of the defendants in error, either of which errors should reverse the judgment.

E. MARINER,